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762094—47



In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 319

ALEX STEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 1663–1671) is reported in 162 F. 2d 120.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 12, 1947 (R. 1671). Petition for rehearing was denied on August 11, 1947 (R. 1694). Petition for a writ of certiorari was filed on September 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February

13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to admit the testimony of certain witnesses called by the petitioner.

2. Whether the conduct of the trial court constituted prejudicial error.

3. Whether the conduct of the prosecutor constituted prejudicial error.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 145 [as amended by Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 136]. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> (c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony,

and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code. (26 U. S. C. 1940 ed., Sec. 145.)

STATEMENT

Petitioner was indicted in the Northern District of Texas on four separate counts. Counts one and two charged that the petitioner wilfully attempted to evade and defeat, by filing and causing to be filed false and fraudulent returns on behalf of himself and his wife, substantial amounts of taxes owing on their community net income for the calendar year 1943, in violation of Section 145 (b), Internal Revenue Code. The third and fourth counts charged that petitioner filed and caused to be filed income tax returns which he did not believe to be true in that they contained the false statements set forth in counts one and two, respectively, in violation of Section 145 (c), Internal Revenue Code. The total net income charged to have been understated was $892,125.47, with a resultant tax deficiency of $870,109.06 (R. 2–8). Petitioner was convicted on all four counts and sentenced to imprisonment for a period of eight years, and fined a total of $24,000 (R. 1629–1630).

The falsity of the returns was predicated on the petitioner's failure to report as income profits realized from liquor transactions during the year 1943. At the trial, evidence adduced by the prosecution showed undisclosed profits from these

transactions in the amount of $891,571.96 (R. 823). Of this amount, $352,000 was reported by the petitioner in his 1944 return, although admittedly derived from fees received in 1943 (R. 1462). Evidence was also offered that at one time petitioner had admitted he kept all of the monies from these transactions (R. 1461) and on another occasion that he had a fifty-fifty deal with one Robert Gould and paid $495,100 of this profit to Gould (R. 1467–1470).

Petitioner testified at the trial that he had had an arrangement with Gould to sell whiskey at over-ceiling prices as Gould's agent (R. 1294, 1418) and that he had paid Gould in cash the sum of $846,275.24 and retained only $65,699.40 as compensation for services rendered and $60,699.42 which he characterized as loans from Gould (R. 1299, 1308–1310, 1316–1340, 1358). Petitioner further testified that in November 1944, Gould gave him the sum of $352,000 with the request that he report it for taxes, and that on the advice of Gould's attorney, he took the money to Texas and returned it as income in 1944. (R. 1375–1378.)

Petitioner called Robert Gould as a witness and, in response to a question as to how much money petitioner had turned over to him in 1943, Gould denied that he had received any money from petitioner. (R. 988.) Gould was then asked if during 1943 he had not received from other persons

approximately one and a half million dollars from the sale of whiskey. This question was objected to and the objection sustained by the court. (R. 985–986.)

The petitioner then offered as witnesses four persons who, it was claimed, had liquor transactions with Gould during the year 1943. It was stated that these witnesses would testify that they had sold whiskey for Gould during this year on a basis similar to the arrangement which Steinberg claimed he had with Gould. On objection, this proffered testimony was excluded by the court. (R. 1032, 1038, 1043, 1075.)

Petitioner then offered as a witness an attorney who was identified as Gould's lawyer. Petitioner's counsel stated that this witness would testify to the fact that he had advised the petitioner that he could report in his 1944 return income admittedly received by him in 1943. Upon objection, testimony of this witness was excluded (R. 1216–1227).

On appeal, the judgment of conviction was affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 1671).

ARGUMENT

1. The petitioner claims that the trial court committed error (Pet. 10) in refusing to let the witness Gould testify concerning the nature of transactions he had with other individuals during

the year 1943 (R. 985, 986). It is argued that the purpose of this testimony was to show a system or habit on the part of Gould with respect to his whiskey transactions. But there was no showing that the persons about whom Gould was to be questioned had any relations with the petitioner or had arrangements similar to those which the petitioner had with Gould (R. 987).

Under the circumstances, this evidence was irrelevant and immaterial and was properly excluded by the trial court. *Commercial Standard Ins. Co.* v. *Gordon's Transports,* 154 F. 2d 390, 394 (C. C. A. 6th); *Caldwell* v. *Commissioner,* 135 F. 2d 488, 490 (C. C. A. 5th); *Muschany* v. *United States,* 324 U. S. 49, 58. For the same reason, it was not erroneous for the court to reject the testimony of the other witnesses who, it was claimed, had dealings with Gould; the immateriality of such evidence is emphasized by the fact that while petitioner testified that he acted as agent for Gould in the sale of liquor (R. 1292), it appeared that the witnesses were dealers whose arrangements with Gould were likely to be quite different from that between petitioner and Gould (R. 1031, 1043, 1076).

Nor is the decision below in conflict with *Insurance Co.* v. *Weide,* 11 Wall. 438; *Holmes* v. *Goldsmith,* 147 U. S. 150; or *Chitwood* v. *United States,* 153 Fed. 551 (C. C. A. 8th), as alleged by petitioner (Pet. 13). These cases merely hold

that collateral evidence of a related nature is admissible for the purpose of establishing a course of trade or custom or habit. They do not support the contention that testimony concerning unrelated transactions with which petitioner was not concerned is admissible. The admissibility of collateral evidence depends on the circumstances of the particular case (*Commercial Standard Ins. Co.* v. *Gordon's Transport, supra*), and its exclusion here raises no question of general importance.

The proffered testimony of Gould's attorney (R. 1220–1226), with respect to the advice given to the petitioner that he could report 1943 receipts as income in 1944 could only have been admissible on the grounds that it negatived intent. *United States* v. *McCormick,* 67 F. 2d 867 (C. C. A. 2d), certiorari denied, 291 U. S. 662. But the conference at which it was claimed that this advice was given was held in November 1944 (R. 1224), eight months after the commission of the crime with which the petitioner was charged. Hence, there is no basis for arguing that this testimony was probative of the intent of the petitioner at the time he committed the offense, and it was clearly self-serving and hearsay. *Malone* v. *United States,* 94 F. 2d 281 (C. C. A. 7th), certiorari denied, 304 U. S. 562. While petitioner claims that the testimony of Gould's attorney would tend to show that petitioner received approximately $300,000 from Gould, part of the money which al-

legedly had previously been given Gould by petitioner (Pet. 19–21, 45–48), the offer of proof and the testimony at the trial contained no such statement; so far as appears, Gould's attorney was simply advising him with respect to a hypothetical question (R. 1220–1227).

2. Petitioner asserts that he was prejudiced by the expressions and intimations of the trial judge, and cites several examples (Pet. 52–60) in support of his contention that the conduct of the trial court was prejudicial.

A close examination of the matters complained of by petitioner discloses that many of them involved the orderly procedure of the trial, and the proper efforts of the trial judge to confine the testimony to the real issues; the others involved the exercise of the trial judge's well-established prerogative to question witnesses and to comment on the evidence. *Glasser* v. *United States,* 315 U. S. 60; *Horning* v. *District of Columbia,* 254 U. S. 135; *Simon* v. *United States,* 123 F. 2d 80 (C. C. A. 4th), certiorari denied, 314 U. S. 694; *Moore* v. *United States,* 132 F. 2d 47 (C. C. A. 5th), certiorari denied, 318 U. S. 784; *Pfaff* v. *United States,* 85 F. 2d 309 (C. C. A. 7th). If at times the trial court spoke emphatically to counsel for petitioner, such emphasis appears to have been warranted since counsel persisted in asking improper questions after the court's ruling.

In his charge to the jury (R. 1574), the trial judge refrained from commenting on the evidence and instructed the jury that it was not to be influenced by any comments or opinions expressed by the court during the course of the trial (R. 1580). Thus there is no real question as to the fairness of the trial accorded to the petitioner.

3. Petitioner complains that he was prejudiced by the conduct and inflammatory remarks of the prosecutor (Pet. 21). An examination of the record, however, discloses that all of the remarks complained of were inferences logically drawn from the evidence in the case. Petitioner, not the prosecutor, developed the fact that he was engaged in black-market transactions (R. 123, 1220, 1370).

The prosecutor may allude to the fact that the accused has committed crimes other than those for which he is on trial, where evidence supporting the particular reference is properly before the jury and the comment is a deduction from that evidence relevant to a material issue in the case. Likewise, he may refer to, and draw unfavorable inferences from, the conduct of the accused shown by evidence properly in the case, when those inferences are relevant to an issue material to the case and to the character of the accused when character is in issue. In making such comment, the prosecutor may characterize the accused or his conduct in language which, although it con-

sists of invective or opprobrious terms, accords with the evidence in the case. *Baker* v. *United States,* 115 F. 2d 533 (C. C. A. 8th), certiorari denied, 312 U. S. 692; *Malone* v. *United States, supra; United States* v. *Wexler,* 79 F. 2d 526 (C. C. A. 2d), certiorari denied, 297 U. S. 703.

The record discloses that only one objection was made to the conduct now complained of; and when the court observed that the prosecutor's statement was a deduction of counsel which the jury should weigh, petitioner's counsel agreed (R. 1520).

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decision is presented. It is therefore respectfully submitted that the petition should be denied.

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